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No. 00-1254

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, and H & H CONSOLIDATED, INC.,
Petitioners,

v.

FREDERICK A. PUSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

In his Brief in Opposition, Respondent Pusey concedes that from the 1940's through the present day, the United States has owned the three parcels of land at Wallops Flight Facility ("WFF") that are at issue here, *see* Opp. at 18, and that the facility has at all times been occupied and operated by federal agencies, *id.* at 3. Pusey concedes as well that when the federal government acquired the property, it obtained and exercised exclusive jurisdiction over all activities conducted on it. *Id.* at 1-2.

But Pusey endorses the position of the Virginia court below that, solely because of the manner in which the United States has chosen to make use of this federal enclave, the federal government has been ousted of its exclusive jurisdiction, such that Virginia now may assert the power to determine as a matter of state labor policy whether contractors performing services for the United States at WFF should be prohibited from requiring that their employees pay an agency fee to the union that represents them.

According to respondent, this question—*viz.*, whether the power to regulate labor relations at this federal enclave rests exclusively with the federal government or must be shared with Virginia—presents only a question of fact, which the Virginia courts resolved by "finding" that jurisdiction "reverted" to the State when, in 1961, the Navy transferred custody of WFF to NASA. *Id.* at 17, 18, 20, 21.

Like the courts below, Pusey bases that conclusion on language in the statute by which Virginia ceded jurisdiction over these lands, which provides "that the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." 1940 Virginia Acts of Assembly, ch. 14. Equating "use[] . . . for naval purposes" with "use by the Navy," Opp. at 13,

respondent declares that this case turns on nothing more than "factual determinations concerning if and when the Navy had a presence on the enclave," *id.* at 17. Because the tenant of the property from 1961 on was NASA—although Pusey concedes that Navy personnel continued to make periodic use of the facilities, *see id.* at 4-5—respondent defends the "factual determination" of the courts below that the requisite "presence" of the Navy was lacking. *Id.* at 14-21.

That analysis, however, rests on two assumptions: first, that the reference in the cession statute to "naval purposes" must be understood as confined to activities *conducted by the United States Navy*; and second, that the language must be confined to activities conducted *regularly*, rather than "occasionally," Opp. at 4, by the Navy. Only by construing the statute as imposing those two limitations can Pusey deem it immaterial (i) that much of NASA's work at WFF has been for the same general aviation-related purposes as the Navy's prior use of the facility—indeed, much of NASA's work has been undertaken directly *for the Navy*, *see* Petition for a Writ of Certiorari ("Petition") at 3-4—and (ii) that personnel of the Navy itself have continued to make periodic use of the facility, *see* Opp. at 4.

Neither Pusey nor the court below has offered any explanation as to why the cession statute should be read as containing the two restrictions on which the decision below necessarily rests; and the statutory language certainly does not compel such a narrow construction. That being so, respondent's argument respecting the authority of state courts to make so-called "findings" as to whether jurisdiction over activities on a federal enclave has "reverted" to the state amounts here to a claim that each state court may, according to its own lights, decide whether the federal government's evolving use of a particular enclave should be considered to have extended beyond the metes and bounds of the purposes, *however ambiguously defined*, for which jurisdiction

originally was ceded. On respondent's view, a state court then is free to declare that the State may proceed to exercise regulatory authority over a domain as to which federal legislative authority previously was exclusive.

Such an approach would leave private parties, as well as state, local and federal authorities, with no way of knowing what laws apply on a federal enclave. Indeed, in this case, not only the petitioners, but also NASA, the National Labor Relations Board, the Virginia Department of Labor and Industry, and the local law enforcement agencies all understood that federal jurisdiction over WFF was exclusive, such that Virginia's "right to work" statute could not be applied to federal contractors on the enclave. *See* Pet. at 4-5, 15.

Respondent's conception of the binding force of state court "findings" treats the question here as if it were one of private property law, rather than what it is – a question of the scope of exclusive federal legislative authority under the Enclave Clause (Article I, § 8, cl. 17) of the Constitution. Respondent, like the Virginia court, ignores the teaching of this Court, *see Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964), and of other federal courts, *see United States v. Johnson*, 994 F.2d 980 (2d Cir. 1993), that courts should not be quick to conclude that the federal government's evolving use of a federal enclave has divested the United States of exclusive jurisdiction—especially where, as here, the federal government has not acted to relinquish its exclusive jurisdiction,[1] but insists that it still possesses, and wishes to assert, such jurisdiction[2].

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[1] The Virginia Code establishes a specific method by which the United States may relinquish exclusive jurisdiction over an enclave. The United States did not relinquish its exclusive jurisdiction over WFF through that procedure, or in any other way. *See* Pet. at 4.

[2] *See* Ex. U1 (NASA's 1994 letter to the Virginia Attorney General stating that "NASA has concluded that the Federal Government, as

In the end, respondent's effort to portray this case as involving nothing but a fact dispute is simply a backhanded way of asserting that there are no governing standards or principles of construction that must be observed in making a determination as to whether the United States has forfeited its exclusive jurisdiction over a federal enclave. *Humble Pipe Line* and other cases indicate otherwise. *See* Pet. at 14-18.[3] Certiorari should be granted to correct the Virginia court's improper encroachment on the exclusive federal jurisdiction that properly applies in this case, and to provide needed guidance to the lower courts respecting the analysis to be followed when it is claimed that the exclusive jurisdiction exercised by the United States over a federal enclave has been divested by virtue of the government's changing use of its property.

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represented by NASA, has exclusive Federal jurisdiction over parcels 1 through 3"). Respondent notes that some doubts were expressed by NASA on this subject before the question of exclusive jurisdiction came to a head. *See* Opp. at 15-16. But when it became necessary for NASA to reach a firm conclusion on the matter, NASA concluded in no uncertain terms that the United States retains exclusive jurisdiction.

[3] Petitioner attempts to distinguish *Humble Pipe Line* on the ground that this case, unlike that one, involves "the total abandonment of the entire enclave." Opp. at 12. Respondent's attempted distinction is specious. The United States never "abandoned" WFF; it simply transferred custody from one federal instrumentality (the Navy) to another (NASA).

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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